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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

BRAIDWOOD MANAGEMENT, et)
al.,)
Plaintiffs,) CASE NO. 4:20-cv-00283-O
VS.) FORT WORTH, TEXAS
XAVIER BECERRA, et al.,)
Defendant.) JULY 26, 2022

VOLUME 1 of 1
TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE REED C. O'CONNOR
UNITED STATES DISTRICT COURT JUDGE

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P R O C E E D I N G S

JULY 26, 2022

oOo

THE COURT: Okay. Please be seated.

We will turn then and start instead with Case No. 4:20-283, John Kelley and others vs. Xavier Becerra and others.

Counsel for the plaintiffs, both of you are here.

Counsel for the defendants are here.

So, Mr. Mitchell, why don't you come to the podium and let me let you make a presentation on why you believe you have standing, and then why you believe your motion should be granted.

MR. MITCHELL: Thank you. Thank you, your Honor, and may it please the Court.

With the Court's permission, I would like to begin with the issues of Article III standing. There are many issues that have been raised. And if the Court wishes, I may stop, if I could, after standing to allow my opposing counsel to respond.

THE COURT: Great.

MR. MITCHELL: Before we proceed on the merits, if the Court's okay with that?

THE COURT: That's acceptable to me, if it's acceptable to your colleagues.

1 MR. LYNCH: Yes.

2 MR. MITCHELL: Thank you.

3 So the government is, as your Honor knows,
4 vigorously contesting our clients' standing to bring this
5 lawsuit, as they have done since the outset of this
6 litigation.

7 Most of the arguments that the government is
8 making with respect to our clients' standing are arguments
9 that this Court need not reach, and in our respectful
10 submission, should not reach.

11 That is because only one plaintiff needs to
12 demonstrate Article III standing under the Supreme Court's
13 precedent if each of the plaintiffs in the case is
14 requesting the same relief from the Court.

15 And Braidwood Management, Incorporated, has, by
16 far, the easiest case for standing. It is seeking the same
17 relief as the other plaintiffs. And we believe, if the
18 Court agrees with our position, that Braidwood Management
19 has standing, it's not necessary to inquire whether each of
20 the additional plaintiffs would have standing in a case
21 where Braidwood Management was not a co-plaintiff to the
22 case.

23 Braidwood Management clearly has standing because
24 the preventive care mandates have commandeered its
25 self-insured plan, and it requires Braidwood Management to

1 change the content of its own plan to provide coverage that
2 it does not want to provide and to do so with no
3 cost-sharing arrangements.

4 Braidwood has no ability under this regime to
5 decide to impose co-payments for any of the preventive care
6 that these agencies have purported to require. It cannot
7 allow any of those expenses to count toward an employee's
8 annual deductible.

9 It has lost control over the self-insured plan
10 that it had prior to the imposition of these preventive care
11 mandates.

12 So our argument will proceed in a syllogism, if I
13 could explain this to the Court. The major premise of our
14 syllogism is that only one plaintiff needs standing if all
15 the plaintiffs are seeking the same relief.

16 The minor premise of our argument is Braidwood has
17 standing. And the conclusion that follows is that all of
18 the plaintiffs therefore have Article III standing to bring
19 the claims.

20 So the government must defeat either the major
21 premise or the minor premise of the syllogism to defeat our
22 case for Article III standing. And the government does
23 contest both the major premise and minor premise.

24 Let me begin, if I could, with the major premise:
25 Only one plaintiff needs standing. The government claims

1 that the one-plaintiff rule doesn't apply to this case.

2 And their argument proceeds as follows: They
3 claim that Braidwood Management would not be entitled in the
4 end to what they describe as a universal injunction.

5 Their position is, if Braidwood prevails, it
6 should get the declaratory and injunctive relief that is
7 limited to Braidwood and that does not extend beyond
8 Braidwood to other plaintiffs in the case.

9 It makes the same claim with respect to our other
10 plaintiffs. So its view is we're not actually seeking the
11 same relief. Braidwood is seeking relief for Braidwood.
12 Mr. Kelley is seeking relief for Mr. Kelley and so on.

13 But that's not the proper inquiry of the
14 Article III standing phase. In considering whether a
15 plaintiff has shown redressability under the Article III
16 test for standing, a court must assume that the plaintiff
17 will ultimately succeed on the merits and assume the
18 plaintiff will seek and obtain the relief he is requesting,
19 regardless of whether the plaintiff is ultimately entitled
20 to the relief.

21 The entitlement to the relief goes to the merits;
22 it doesn't go to standing. And the Supreme Court has said
23 time and time again that a court is to ask whether the
24 requested relief, not the relief to which it's ultimately
25 entitled, but whether the requested relief will redress the

1 plaintiff's alleged injuries.

2 If I could quote recently from the Supreme Court's
3 Ted Cruz for Senate case. This is the Supreme Court's most
4 recent pronouncement on Article III standing.

5 The Court writes: "For standing purposes, we
6 accept as valid the merits of appellee's legal claims."

7 Quoting again from the Supreme Court in Steel Co.,
8 "There must be redressability, a likelihood that the
9 requested relief will redress the alleged injury."

10 So for the standing analysis, the Court should
11 assume that the plaintiffs will obtain the relief they
12 request. Even if the Court ultimately disagrees with our
13 merits argument and concludes we're not entitled to the
14 scope of this relief, the Court still has to assume we will
15 get that relief and ask, will that relief redress the
16 alleged injury?

17 So going back to the one-plaintiff rule.
18 Braidwood Management, Incorporated, just like Mr. Kelley,
19 just like all the other individual plaintiffs in the case,
20 all of them are requesting the same relief from this Court:
21 a declaratory judgment that pronounces the preventive
22 mandates unconstitutional because of the appointments clause
23 problems and because of the RFRA problems with respect to
24 the prEP and other mandates, and injunctive relief that
25 would restrain the defendants from enforcing them in any

1 situation.

2 That's the requested relief. All the plaintiffs
3 are requesting the same relief. Therefore, the
4 one-plaintiff rule applies. And the Court just asks: Does
5 one plaintiff have standing? And if the answer to that
6 question is yes, the other plaintiffs can come along for the
7 ride.

8 Let me shift to the minor premise of the argument.
9 Braidwood has standing. Now, this is an easy case with
10 respect to Braidwood. I think the other plaintiffs present
11 closer questions, although we believe they have standing as
12 well under the purchaser doctrine.

13 Let's just focus on Braidwood for a moment because
14 we only need to show standing for one. These preventive
15 care mandates are commandeering the self-insured plan that
16 Braidwood Management incorporates, administers, and provides
17 to its employees.

18 It requires Braidwood to change the contents of
19 that plan. It requires Braidwood to alter the plan to say
20 these services will now be covered with no co-pays. Even
21 though, before the mandates, Braidwood did not cover this
22 stuff.

23 That inflicts injury in fact, regardless of
24 whether there is an ultimate financial harm to Braidwood.
25 The government is suggesting Braidwood doesn't have standing

1 to challenge the prEP mandate, because they say it's not
2 likely that any of its employees would ever seek
3 reimbursement for those expenditures.

4 That may very well be true, but there are two
5 responses to that. Number one, Braidwood is challenging far
6 more than just a prEP mandate. Braidwood is asking this
7 Court to restrain the defendants from enforcing any of the
8 preventive care mandates because they violate the
9 appointments clause.

10 As I understand the government's reply brief, and
11 the government should correct me if I'm wrong, they don't
12 appear to be challenging Braidwood's standing to present an
13 appointments clause claim. They focus only on this issue of
14 the prEP drugs.

15 So it appears, and the government, again, they
16 should tell the Court if I'm mischaracterizing their
17 argument, but it appears they're questioning Braidwood's
18 standing only with respect to the RFRA claim and not with
19 respect to the appointments clause claim.

20 But there's a second point as well. Even if the
21 government is right to suggest that Braidwood's employees
22 are unlikely to wind up requiring Braidwood to pay for prEP
23 drugs, there's still injury in fact, because Braidwood has
24 to change the contents of its plan.

25 Even if there's never an ultimate financial harm

1 to Braidwood, Braidwood has to make changes to its plan.
2 And that's enough for standing, because all one needs for
3 standing is an identifiable trifle.

4 THE COURT: Identifiable what?

5 MR. MITCHELL: Trifle. That's from the Supreme
6 Court's opinion in SCRAP, 1973. It appears in the footnote.

7 An identifiable trifle is enough for standing to
8 take Braidwood out of the realm of mere ideological injury
9 and into a situation where Braidwood actually has been
10 affected by the contraceptive mandate.

11 And the fact that it has to change the plan gives
12 it standing, even if the government's right to suggest with
13 respect to prEP drugs, they will never really have to pay
14 anything out because they don't have employees who will ever
15 claim that benefit. All we need is the identifiable trifle
16 and we have that here with respect to Braidwood.

17 So let me return, if I could, to the syllogism.
18 The major premise of the argument: The one-plaintiff rule
19 applies. The minor premise of the argument: Braidwood has
20 standing.

21 If the Court accepts the major premise and the
22 minor premise, the conclusion that follows, as a matter of
23 logic, is that every one of the plaintiffs has Article III
24 standing to seek the same relief that Braidwood is
25 requesting.

1 Namely, a declaration from this Court that the
2 preventive care mandates are unlawful and an injunction that
3 restrains the defendants from enforcing them. So that's my
4 presentation on standing. I will yield to Mr. Lynch, unless
5 you have any questions?

6 THE COURT: So just let me, just before we turn it
7 over.

8 MR. MITCHELL: Yes.

9 THE COURT: Their argument is that Braidwood --
10 well, let me back up.

11 Braidwood is self-insured. Can you tell me what
12 that means?

13 MR. MITCHELL: Self-insured means that they are
14 ultimately paying the money out for the health benefits,
15 rather than have an insurer hold the risk for them.

16 THE COURT: And does that mean that Braidwood acts
17 as an insurance company?

18 MR. MITCHELL: Essentially, it does, with respect
19 to its own employees.

20 So what they do is they retain a third-party
21 administrator to actually administer the plan, but Braidwood
22 decides the contents of the plan, and says this is what we
23 cover; this is what we don't. These are the co-pays; these
24 are the deductibles. They make all the decisions themselves
25 as the company, because they are the ultimate insurer.

1 Now, they had the prerogative prior to the
2 Affordable Care Act to decide the scope of coverage with
3 respect to preventive care. They no longer have that
4 prerogative and that affects injury in fact.

5 THE COURT: A little bit more on the
6 self-insurance issue. If you are self-insured, you are
7 acting as an insurance company and that means you have to
8 comply with the mandates that the federal government has put
9 into play?

10 MR. MITCHELL: That's correct. You have to
11 provide all the preventive care that has been dictated by
12 these relevant entities: HRSA, ACIP, and the Task Force, and
13 you have to provide it at zero marginal cost to the patient.
14 No co-pays can be imposed and it can't count for your annual
15 deductible.

16 THE COURT: I see.

17 MR. MITCHELL: So, again, we think that's an easy
18 case for standing.

19 Your Honor, to be clear, we're not conceding in
20 any way that our remaining plaintiffs would lack standing in
21 the absence of Braidwood. We acknowledge they present
22 closer cases.

23 The purchaser standing doctrine, which is
24 well-developed in the D.C. Circuit, the government's right
25 to point out that the Fifth Circuit hasn't adopted that.

1 Now, they haven't rejected it either. We think
2 it's a sound theory of standing, but this is a much more
3 solid basis for standing, to rely on Braidwood.

4 We just don't think it's necessary for the Court
5 to get into these very interesting, but somewhat more
6 complicated questions with respect to the other plaintiffs.

7 THE COURT: I will ask you something about the
8 purchaser standing in just a minute, but as it relates to
9 the Braidwood self-insurance standing, you referenced the
10 Little Sisters of the Poor case and the abortifacients and
11 how Hobby Lobby did not have to show that someone was making
12 a claim for those particular drugs that they objected to,
13 but the government says that, statistically speaking, that
14 someone, given the number of employees that Hobby Lobby had,
15 someone was going to make a claim on that policy for those
16 drugs.

17 MR. MITCHELL: Right.

18 THE COURT: That would require the insurance
19 company to pay, Hobby Lobby to pay for that to be done. And
20 that that statistical exercise isn't at play here?

21 MR. MITCHELL: Right.

22 THE COURT: You would agree with that?

23 MR. MITCHELL: I think that's a fair point by the
24 government with respect to the empirical claim they're
25 making, which is it's far more likely in a company like

1 Hobby Lobby, which has a very large number of employees, I
2 think tens of thousands, and contraception which is much
3 more commonly used than prEP drugs. It's obviously far more
4 likely that Hobby Lobby would ultimately pay out for
5 contraception that it found objectionable.

6 But that said, the Hobby Lobby decision doesn't
7 discuss Article III standing at all. So I want to be
8 careful not to lean too heavily on that. I think it also
9 undercuts the government's argument as well.

10 We don't have a ruling from the Supreme Court on
11 whether Hobby Lobby had standing or why Hobby Lobby had
12 standing. It doesn't appear to me from reading the Court's
13 opinion that this point by the government should make a
14 difference because Justice Alito emphasized that a
15 complicity-based objection has to be accepted by the Court
16 as long as it's sincere.

17 It doesn't really matter whether the
18 complicity-based objection is rooted in fact or reality.
19 For example, Hobby Lobby claimed that certain contraceptives
20 that the FDA approved acted as abortifacients. There are
21 many medical experts who disagree with that as a scientific
22 matter, but none of that was relevant in Hobby Lobby.

23 The mere fact that Hobby Lobby held the belief
24 that this would make it complicit in the provision of
25 abortifacient contraceptive had to be accepted, as long as

1 it was sincere. That's the question I think for the Court
2 to ask here: Is the belief of our plaintiffs sincere?

3 No one's questioning the sincerity of our
4 plaintiffs' -- of our clients' complicity-based objections.
5 They may be questioning the empirical claims that our
6 clients are making. And they may very well be right to call
7 those into question. Maybe Dr. Hotze won't be paying out
8 actual money from Braidwood for these prEP drugs.

9 But if he believes that the mere provision of
10 coverage makes him complicit in something that violates his
11 religious beliefs, and he has claimed that in his affidavit,
12 and that is sincere, that's enough to show a substantial
13 burden under this exercise.

14 And therefore, that's enough to show injury in
15 fact because a substantial burden under RFRA is, by
16 definition, enough to show Article III injury.

17 So again, I want to be careful with my reliance on
18 Hobby Lobby. Hobby Lobby did not discuss standing, but
19 Hobby Lobby did discuss the meaning of substantial burden,
20 and a substantial burden is per se injury in fact under the
21 Article III standing test.

22 THE COURT: Okay. If I can just get back to the
23 argument that they're making about Braidwood having no
24 standing because they're not likely to have to pay any money
25 for prEP drugs.

1 And so, as an empirical matter, that may bear out,
2 in your view. But you're saying this earlier Supreme Court
3 case has said, for standing purposes, any trifle?

4 MR. MITCHELL: That's right.

5 THE COURT: And what would the Supreme Court
6 define trifle to be?

7 MR. MITCHELL: I think they would define it as
8 something that goes beyond a mere ideological grievance. So
9 it has to be something that goes beyond the psychological
10 harm that's incurred by the observation of conduct with
11 which one disagrees.

12 It has to go something beyond this offends my
13 belief system. It has to be something that affects you in a
14 tangible and concrete way, even if it's very small.

15 So the fact that Dr. Hotze and Braidwood have to
16 go in and tinker with their plan in response to these
17 mandates from the government, that's enough to show
18 standing. I realize that's a minor injury. You just have
19 to change some words on a piece of paper, but you still have
20 to do something.

21 And the fact that they had to do that act is
22 enough to take them out of the role of what I would just
23 describe as a mere ideological grievance and into the realm
24 of where you actually have an injury in fact under the
25 Supreme Court's test.

1 So we have identifiable trifle. I realize it may
2 just be a trifle. They may not be paying out gobs of money
3 for the prEP drugs or even have the right to say that, but
4 they still have injury in fact, even if it's not financial
5 injury.

6 THE COURT: Okay. And then, just on the purchaser
7 standing. In their latest reply -- their last reply brief,
8 they cite the litigation in the D.C. Circuit involving the
9 AmTrak tickets and the arbitration clause.

10 And the government writes, it's not a quote, but
11 they write in their brief that it appears that the D.C.
12 Circuit is scaling back and limiting the purchaser standing
13 doctrine to some degree. What's your take on that?

14 MR. MITCHELL: Yeah, it was hard for me to see
15 from the D.C. Circuit's opinion where exactly they're trying
16 to draw the line here. I may be misquoting, but they're
17 talking about the essential attributes of the product, as
18 opposed to something that's nonessential, like an
19 arbitration clause.

20 Even if we were to assume that we can indulge that
21 assumption for a moment, my plaintiffs are being deprived of
22 the ability to buy health insurance unless they engage in
23 conduct that, in their view, makes them complicit in conduct
24 that violates their sincere religious beliefs.

25 If the purchaser standing doctrine is to be

1 accepted, it would at least have to include that, given the
2 existence of federal RFRA. The federal law has recognized
3 this, not simply as an injury in fact, but as a violation of
4 federal law to have something that imposes on any person an
5 obligation to engage in conduct that violates his religious
6 belief, or in this situation, excluding them from the health
7 insurance market entirely, unless they're willing to buy in
8 and pool their money with others who are engaged in conduct
9 that is contrary to their sincere religious beliefs.

10 Again, no one is questioning the sincerity of a
11 client's complicity objections. That's the crucial point.
12 Hobby Lobby says if complicity-based objections are sincere,
13 they have to be accepted by a court, regardless of whether
14 the Court agrees with them empirically or factually.

15 So it's true of all religions. Many people hold
16 religious beliefs that nonbelievers would think are
17 delusional, but the court can't come in and say, "Your
18 religious beliefs are factually wrong. Therefore, you
19 aren't substantially burdened in your exercise of religion."

20 THE COURT: Staying with the purchaser standing
21 doctrine for a moment then, would you address for me, for
22 the non-Braidwood plaintiffs, or I guess, Braidwood might be
23 in there as well, the idea that there's no traceability for
24 those plaintiffs under the purchaser standing doctrine.

25 In other words, there's no -- you provided no

1 evidence that either insurance companies will offer plans
2 that meet these objections, and then the argument that
3 there's no evidence that you're paying more for policies for
4 your nonreligious plaintiffs.

5 MR. MITCHELL: Yeah, I think your Honor is right
6 to point out that we haven't proven beyond a preponderance
7 of the evidence that premiums would go up in the absence of
8 preventive care mandates.

9 There are reasons to think that premiums might be
10 affected -- I'm sorry, the premiums would go down in the
11 absence of the preventive care mandates.

12 The empirical evidence is inconclusive on this
13 point, which is why we didn't rely on it. We did rely on it
14 at the pleading stage, but at summary judgment we actually
15 mete out evidence. There wasn't enough out there, in my
16 judgment, to argue to the Court that we could show, by a
17 preponderance of the evidence, that the premiums would go
18 down if the requested relief were granted.

19 It's just not clear. Some people think the
20 premiums would go down, but it's largely speculative. And
21 really, I don't think there's any way to know until the
22 judgment that we are requesting would go into effect, and we
23 would have to see what happens in response to that.

24 With respect to traceability, we don't have to
25 prove in fact that these products would be offered with

1 respect to the requested relief. We just have to show that
2 it's traceable. Not but-for causation. Just that the
3 injury is traceable to the defendant's conduct.

4 And the fact that before the Affordable Care Act
5 there were health insurance policies available that excluded
6 contraception and they excluded prEP drugs and they excluded
7 other things that are being required and covered by the
8 Affordable Care Act is, in our view, more than enough to
9 show traceability.

10 Because we know before the Affordable Care Act
11 there at least were some insurance companies that weren't
12 covering this. That's why the Affordable Care Act came in,
13 to mandate the coverage of preventive care by everyone. So
14 that's enough to show traceability on that theory.

15 Now, again, with respect to the premiums and
16 whether those would fluctuate and go up or down, we didn't
17 introduce evidence of that because we didn't think we could
18 prove that by a preponderance of the evidence. There just
19 wasn't solid proof, one way or the other, on what the effect
20 on premiums would be.

21 That's why we're principally relying on
22 Braidwood's standing, because we think that's the easier way
23 to establish standing. Again, we still think we can get
24 there with the other individual plaintiffs. We still think
25 we can get there with the other individual plaintiffs, but

1 it's a somewhat tougher row to hoe.

2 THE COURT: I guess the reason I'm asking this
3 question is it appears that post the DeOtte case, that
4 there's not been a market, I guess, for insurance companies
5 to offer these plans that would satisfy religious
6 objections, at least in these preventive care mandates.

7 So, even if you get -- and I think that's part of
8 their argument, that is, even if you get a result separate
9 on the side of the religious plaintiffs, it's not going to
10 achieve the result you want.

11 MR. MITCHELL: I don't -- I'm sorry?

12 THE COURT: So what you're seeking from me won't
13 satisfy these standing elements, I don't know if you read
14 the mask mandate case that came out last night from the
15 Fifth Circuit, a 2-to-1 decision that talked about standing
16 analysis when the effect would be on the third party.

17 Did you happen to read that?

18 MR. MITCHELL: I haven't had a chance to read it.
19 I'm sorry, your Honor.

20 THE COURT: Well, take a look at that when you get
21 a chance, but I do wonder about that. You got a judgment in
22 DeOtte and it certified a class there of religious objectors
23 to these mandates.

24 It appears -- and I don't know if you dispute
25 that -- but it appears there's not been a market for

1 insurance companies to go and make these changes that would
2 be permitted presumably post DeOtte. So what's your take on
3 that?

4 MR. MITCHELL: I don't think it's fair, your
5 Honor, with all respect, to rely on DeOtte against Azar to
6 undercut our case here, because the remedy we asked for and
7 received in DeOtte was quite narrow.

8 It was only for religious objectors. We were
9 asking the Court to allow insurers to provide
10 contraceptive-free coverage, but only to religious
11 objectors.

12 And that is such a small, narrow slice of the
13 market that it's unsurprising that insurance companies
14 haven't responded to that in the way that I think the DeOtte
15 plaintiffs had hoped.

16 Here, we're seeking much broader. We're asking
17 the Court to enjoin the enforcement of the mandate across
18 the board. Because, under the appointments clause claim
19 that we're making, the entire contraceptive mandate is
20 improper, invalid, and unconstitutional because none of
21 these officers were constitutionally appointed.

22 That would have a dramatic effect on the health
23 insurance market. And prior to the contraceptive mandate,
24 only half of the health insurance plans offered it at the
25 time -- I know it's not in the record so I probably

1 shouldn't be blurting that out -- with respect to the
2 traceability point, the proper line of inquiry is how did
3 the world exist prior, before the Affordable Care Act?

4 It was possible to obtain contraceptive-free
5 health insurance before the contraceptive mandate. That's
6 why they imposed the contraceptive mandate. If all the
7 insurance companies were offering this on their own, there
8 would be no need for a contraceptive mandate.

9 So that injury is traceable to the government's
10 action because it's taken away on the market something that
11 used to be available.

12 Now, your Honor's question, I think, is what would
13 happen if the Court were to enjoin the enforcement of the
14 mandate? Would contraceptive-free health insurance come
15 back into effect?

16 And again, the test is, is it likely, as opposed
17 to merely speculative, right, that the injury would be
18 redressed by relief from the Court. It's certainly likely,
19 because so many people just do not need contraceptive
20 coverage.

21 People who are over the age of 45 don't need
22 contraceptive coverage. People who aren't engaged in
23 behavior that requires contraception don't need
24 contraceptive coverage. That's a majority of the
25 population.

1 Again, we've seen this before. We saw what the
2 market looked like before the Affordable Care Act, and
3 that's enough to just meet the rather minimal burden that we
4 have to show that it's likely that the injury would be
5 redressed.

6 But again, going back to Braidwood. With
7 Braidwood, it's as clear as can be. The injury is obvious,
8 the traceability is unquestioned, and the redressability.
9 They don't have to change their plan, but that's the injury.
10 That's easily redressed by the relief we are requesting from
11 the Court.

12 So these are all, I think, very nuanced and
13 somewhat interesting questions with respect to the other
14 plaintiffs, but Braidwood's indisputable standing makes
15 this, in our view, a rather easy case, once the Court
16 acknowledges that the one-plaintiff rule kicks in.

17 Again, I understand it's a point we disagree with
18 the government on, but as long as the Court can accept the
19 major premise and minor premise, the syllogism I mentioned
20 at the outset, all these other issues, even though they are
21 very interesting, they just don't need to be resolved
22 because they introduce, in our view, just needless
23 complications in the case.

24 THE COURT: Where is DeOtte, by the way? Do you
25 know?

1 MR. MITCHELL: Oh, yes, your Honor.

2 THE COURT: I'm just curious now.

3 MR. MITCHELL: It's an important question to ask.

4 The Fifth Circuit panel reversed the Court's judgment in
5 January. I think the Court is aware of that.

6 THE COURT: Right.

7 MR. MITCHELL: We petitioned for en banc rehearing
8 at the end of January. We still don't have a ruling from
9 the court.

10 THE COURT: I see.

11 MR. MITCHELL: So the mandate hasn't issued.

12 THE COURT: Right.

13 MR. MITCHELL: I was waiting for the mandate to
14 issue to provide an update to the Court, because that would
15 obviously affect the Court's res judicata holding. As of
16 today, the Court's res judicata holding is still sound
17 because the DeOtte judgment is still in effect.

18 THE COURT: Right.

19 MR. MITCHELL: Because we petitioned for a
20 rehearing en banc, that delays the issuance of the mandate.
21 We will let the Court know, though, as soon as the mandate
22 issues or if they grant the hearing en banc, which would
23 further delay it.

24 THE COURT: Exactly. So if they do not grant a
25 rehearing en banc and they issue the mandate reversing the

1 case, then I would need to reconsider the res judicata
2 issue?

3 MR. MITCHELL: I believe so, yes.

4 THE COURT: And what is the effect of your amended
5 complaint, taking out those other details in there?

6 What is the effect of that?

7 And does that affect standing in any way?

8 MR. MITCHELL: I do think having read the
9 government's reply brief that -- and I did not at the time
10 believe we had prejudiced them in any way with what we had
11 done -- but they have claimed in their reply relief that
12 they would have wanted to seek discovery from our plaintiffs
13 about the sincere religious objections to the other non-prEP
14 drugs and noncontraception issues.

15 So I do agree with the government at this point
16 because they have a certain prejudice that the Court should
17 not breach our RFRA claims outside the prEP mandate and the
18 contraceptive mandate.

19 Claims do evolve throughout a case. I hope we
20 didn't cause needless complications with some of the
21 shifting that we did throughout the litigation, but
22 sometimes clients -- claims will evolve as the case
23 proceeds.

24 And sometimes claims are removed and sometimes, in
25 this case, an attempt was made to bring those back to life.

1 But given that the government has claimed prejudice from
2 their inability to take discovery, we would agree and
3 respectfully withdraw the RFRA claims that do not extend
4 beyond -- I'm sorry -- we would withdraw the RFRA claims
5 that extend beyond prEP drugs and the contraceptive
6 mandates, which the Court has ruled on with respect to
7 res judicata. But given the possible complication with
8 DeOtte, that may come back to life if the mandate issues in
9 the Fifth Circuit.

10 THE COURT: Okay. Just the last question here.
11 You cite this Duke Law Review, one good plaintiff --

12 MR. MITCHELL: Yes.

13 THE COURT: -- is enough or not enough?

14 MR. MITCHELL: Not enough.

15 THE COURT: Yeah.

16 MR. MITCHELL: Obviously, I don't agree with the
17 thesis of the article.

18 THE COURT: Yeah.

19 MR. MITCHELL: But I was citing the article for
20 the appendix that it has at the very end, which lists the
21 impressive array of authority behind the one-good-plaintiff
22 rule, even though the author was criticizing it.

23 THE COURT: Right.

24 MR. MITCHELL: So while I acknowledge his
25 criticism, it is an academic law review article that does

1 not have binding authority.

2 What is binding are the cases that were cited in
3 his appendix, and that's what we're primarily relying on,
4 notwithstanding his criticism of the rule, but it is clearly
5 the law that the Supreme Court endorsed in Little Sisters.

6 THE COURT: Yeah.

7 MR. MITCHELL: I don't think we can do any better
8 than that in terms of showing the current related ruling,
9 despite some objectors that exist in the academy.

10 THE COURT: Okay. Very good then. So you want to
11 turn it over to your colleague and then come back to the
12 merits?

13 MR. MITCHELL: Yes, please. Thank you.

14 MR. LYNCH: Thank you, your Honor.

15 THE COURT: Thank you. Yes.

16 MR. LYNCH: The ultimate point on standing is that
17 it's a summary judgment and the plaintiffs must demonstrate
18 with evidence an actual or imminent injury caused by the
19 conduct complained of and it's redressable by the Court;
20 it's their burden.

21 And plaintiffs, at this point, have no evidence
22 beyond declarations that what they object to -- or that they
23 object to some of the coverage. That's it.

24 You know, three of the plaintiffs, Kelley -- John
25 Kelley, Kelley Orthodontics, and Joel Starnes don't

1 participate in the health insurance market at all for
2 reasons unrelated to this lawsuit. So they don't have
3 standing.

4 Two other plaintiffs, Zach and Ashley Maxwell,
5 have failed to establish that their injury was caused by
6 defendant's actions or redressable by the Court because they
7 have no idea, they say, whether their health plans would
8 include the objected-to coverage, even absent the challenged
9 requirements.

10 And as your Honor pointed out, both the Fifth
11 Circuit and the Supreme Court say that more of a showing is
12 required when the standing depends on the actions of third
13 parties not before the courts, like insurance companies,
14 rather than less than here.

15 And here, the plaintiffs have made no showing that
16 they would be able to obtain their desired insurance without
17 these coverage requirements.

18 And indeed, it wouldn't be redressable anyway,
19 because as plaintiffs concede, their appointments clause
20 claims do not reach the guidelines as they were before the
21 Affordable Care Act was implemented.

22 So if, for example, there was an HPV coverage
23 recommendation in effect, and I believe it's 2007, but
24 before the Affordable Care Act was passed. And so,
25 essentially, there's no appointments clause issue because

1 Congress recognized, when passing the Affordable Care Act,
2 that those guidelines would be covered and in effect even
3 under plaintiffs' theory.

4 Any plaintiffs, to the extent that they have an
5 objection that is not grounded in their religious beliefs
6 but is grounded purely in the economics or just having
7 coverage that they don't want or need, for whatever
8 nonreligious reason, your Honor was right to point out that
9 we referenced the Weissman decision in the D.C. Circuit.

10 And what that decision makes clear is that, under
11 this purchaser standing doctrine that plaintiffs rely on, a
12 plaintiff may have standing if the government action
13 rendered a consumer's desired product, as defined by its
14 core features, not readily available and whether it rendered
15 the product unreasonably priced.

16 My friend conceded just now that they can't show
17 that health insurance was rendered unreasonably priced by
18 the actions they challenge. And it is, I think, certain
19 that health insurance, as defined by its core features, is
20 still available. Their allegation is that they can get
21 health insurance that covers more than they want, rather
22 than less.

23 So health insurance is still available to them.
24 It's just a question of the exact, you know, peripheral
25 features in the product that, you know, they will get health

1 insurance with things that they don't want to use, as well
2 as things that they do. So I don't think, to the extent
3 they have nonreligious objections, any plaintiff has
4 standing, given Weissman.

5 The last issue, since my friend relies on
6 Braidwood specifically, because Braidwood is self-insured,
7 that means it doesn't pool risk with other insurers, and it
8 can't claim to be supporting payment for prEP for
9 individuals who are not Braidwood employees or their
10 insureds -- their covered insureds.

11 And when the -- the complicity argument that
12 Braidwood makes, their allegation is that, by covering
13 certain services, they are facilitating acts by people --
14 other people that they disagree with.

15 But if no one ever claims these insurance
16 benefits, if no employee or their insured says -- their
17 dependent says, you know, we need prEP drugs, then Braidwood
18 is not facilitating any acts, by their own theory.

19 You know, to have complicity based on certain
20 acts, somebody who's linked to Braidwood has to be engaging
21 in those acts. And Braidwood has not made any showing
22 whatsoever that that's likely to happen or going to happen.

23 PrEP at the time of the requirement was used by
24 less than one-tenth of a percent of the American people.
25 Braidwood has 70 employees.

1 Mr. Mitchell was right to note that the Hobby
2 Lobby case that he talks about is not a standing case. So
3 it doesn't -- that was never disputed whether people would
4 be -- whether Hobby Lobby could make a showing that their
5 employees would use those drugs -- use the drugs in question
6 there, because I think it was a given that somebody would,
7 given the number of employees, but that showing is not made
8 here by Braidwood.

9 And I think that the standing question really
10 comes down to have they provided evidence that they will
11 actually, in the way that they have said, that their
12 complicity that they object to, will that actually be
13 implicated by that? And I think they can't show it. They
14 haven't shown it. So I will rest there.

15 THE COURT: Would an insurance company, Aetna,
16 would Aetna be able to challenge this mandate?

17 In other words, would Aetna be able to come in and
18 say, we offered all these policies before the ACA or before
19 the mandates came into place, we would like to continue to
20 offer some of those policies, we think the appointments
21 clause and the vesting clause and the delegation doctrine
22 are bad here, would they have standing, an insurance
23 company?

24 MR. LYNCH: They might. It would certainly depend
25 on what injury they were specifically claiming. The issue

1 here is really about what plaintiffs have shown with their
2 evidence on summary judgment and met that burden.

3 I think it would be possible that an insurance
4 company could, depending on the claimed injury, conceivably
5 meet that burden.

6 THE COURT: What would they have to show?

7 So if they came to you and they said, before all
8 these mandates went into place, we offered these policies
9 and we made good money on these policies, and we would like
10 to continue to offer these policies to anyone who might want
11 to purchase them, what else would they have to show to you?

12 MR. LYNCH: I think they would have to show that
13 in some way the failure to be able to offer these policies
14 has hurt their business. I mean, I think that their injury
15 would likely be an economic one.

16 And presumably Aetna could show, based on their
17 internal accounting, and that would be, I think, the path
18 that they would take. But again, without having the claims
19 that they have made and specific allegations, what they
20 would do and what they have to do is hard for me to say.
21 It's speculation.

22 THE COURT: And what is your take on
23 Mr. Mitchell's argument that the Supreme Court has said even
24 a trifle is sufficient injury for standing purposes?

25 Let me just ask you this. Set injury aside. For

1 Braidwood and for Braidwood's self-insurance argument, if
2 they have an injury, if they have an injury, do you agree
3 that redressability and traceability would be met by them?

4 MR. LYNCH: I think that's likely correct, your
5 Honor.

6 THE COURT: Okay. And so, it sounds like
7 Mr. Mitchell is making the argument that the federal
8 government has made Braidwood make these changes, and that
9 this footnote in this opinion in 1973 says that is a
10 sufficient injury. It's something more than a mere trifle.

11 What's your take on that?

12 MR. LYNCH: I think here they've alleged and
13 claimed and put into evidence what they claim their injury
14 is. And their claim is that it's because of a religious
15 objection to being complicit in behaviors that the Braidwood
16 principal, Dr. Hotze, doesn't agree with.

17 That's been their argument. That's what Dr. Hotze
18 says in his declaration. He's not claiming that he's
19 injured by changing his plan. This is new as of today.

20 The declaration says, "I'm complicit by supporting
21 behaviors that I don't agree with" and to actually support
22 those behaviors, yes, they have some evidence that he's
23 supporting those behaviors that someone is going to take
24 advantage of this.

25 They just haven't showed any evidence that any

1 employee or prospective employee intends to avail themselves
2 of these services at all.

3 THE COURT: Do you understand their self-insurance
4 process? I don't. I'm asking you.

5 MR. LYNCH: Vaguely, your Honor.

6 THE COURT: And so, my question to you is, if they
7 have an employee that might utilize prEP drugs, would
8 Braidwood be notified of that, or would their third-party
9 claims administrator simply pay it because it is covered
10 under their policy?

11 MR. LYNCH: So that, I don't know for sure, your
12 Honor. I would have to defer to counsel and Braidwood about
13 that.

14 THE COURT: Okay. And what is your take on
15 counsel's argument that, so long as all of the plaintiffs
16 are seeking the same relief, then standing exists?

17 What is your take on that and the cases that they
18 cite and the arguments -- of course, the Law Review article
19 criticizes this article, but it does list --

20 MR. LYNCH: Right.

21 THE COURT: -- as counsel suggested, lists, you
22 know, an impressive list of cases that say this.

23 MR. LYNCH: Yeah. So I think that I would put it
24 differently than Mr. Mitchell did. If one plaintiff has
25 standing, your Honor can reach the merits of any claim that

1 that plaintiff has.

2 That doesn't mean that the other plaintiffs have
3 standing or, you know, if -- specifically with the RFRA
4 claim, where the relief would be an individual exception to
5 some rule. If a plaintiff doesn't have standing, they can't
6 obtain relief.

7 The constitutional claims are different, in that
8 your Honor could reach the merits of the constitutional
9 claim if one plaintiff has standing and, you know, enjoin
10 coverage or enjoin the rule. But it's not that every
11 plaintiff has standing; it's plaintiff and injury-specific,
12 claims-specific.

13 THE COURT: Okay. All right. Thank you.

14 MR. LYNCH: Thank you.

15 THE COURT: Do you want to reply and then move to
16 the substance?

17 MR. MITCHELL: Your Honor, I can reply if you have
18 questions. But if not, I think I'm content to move on to
19 the merits, if that works for you?

20 THE COURT: Very good.

21 MR. MITCHELL: And your Honor, I will begin with
22 the appointments clause, if I could. That's where I will
23 spend the bulk of my time.

24 The fundamental constitutional problem with the
25 preventive care coverage regime is that it empowers

1 individuals who have not been appointed in conformity with
2 the Constitution to unilaterally decree that preventive care
3 all private insurers must cover.

4 This indisputably qualifies as an exercise of
5 "Significant authority pursuant to the laws of the United
6 States." And it therefore requires that these individuals
7 be appointed in conformity with the appointments clause as
8 officers of the United States.

9 The government has offered many ways in its
10 briefing to mitigate or obviate these appointments clause
11 problems, but none of them hold water at the end of the day.

12 I would like to go through the arguments, if I
13 could, one by one that the government has offered. And let
14 me begin with their, what I will call, ratification
15 argument.

16 And this is the idea that Secretary Becerra has
17 taken care of any appointments clause problems that might
18 have existed in the initial promulgation of these preventive
19 care mandates because he issued a memo in January of 2022
20 that purports to ratify the previous edicts that have been
21 issued by ACIP, HRSA, and the Task Force.

22 Now, this doesn't fix the problem for two reasons.
23 Number one, the Secretary just has no authority under the
24 statute or any other source of law that we've been able to
25 find to ratify or reject the preventive care mandates that

1 have been imposed by the Task Force or by ACIP or HRSA.

2 Section 300gg-13(a)(4), one through four, compels
3 the Secretary to implement their decisions whether he
4 approves of them or not.

5 And that's what distinguishes this case from
6 Guedes against ATF, the D.C. Circuit case the government
7 relies on heavily throughout their brief.

8 Because the Attorney General's authority to ratify
9 in that case was "Unquestioned." That is not the situation
10 here.

11 The statute vests the authority to determine the
12 scope of preventive care coverage with the Task Force and
13 with ACIP and with HRSA. It does not authorize the
14 Secretary of Health and Human Services to review or in any
15 way countermand their decisions.

16 Now, the government tries to rely on a statute
17 codified at 42 U.S.C., Section 202. They claim that the
18 statute somehow authorizes the Secretary to override the
19 decision to make up HRSA and the Task Force. But I would
20 like to read the statute to the Court. I don't know whether
21 your Honor has it in front of you?

22 THE COURT: I don't.

23 MR. MITCHELL: I did not bring a hard copy
24 with me.

25 But here's what it says, "The Public Health

1 Service and the Department of Health and Human Services
2 shall be administered by the Assistant Secretary for Health
3 under the supervision and direction of the Secretary."

4 So I will read this again. "The Public Health
5 Service and the Department of Health and Human Services
6 shall be administered by the Assistant Secretary for Health
7 under the supervision and direction of the Secretary."

8 Now, what this statute says is that the Public
9 Health Service, which includes ACIP and HRSA -- it does not
10 include Preventive Services Task Force. The Public Health
11 Service is administered by the Assistant Secretary for
12 Health, and that the Assistant Secretary for Health is, in
13 turn, supervised and directed by the Secretary for Health
14 and Human Services.

15 It does not say that the Secretary supervises and
16 directs the Public Health Service itself. The Secretary
17 supervises and directs the Assistant Secretary for Health
18 who, in turn, administers -- it doesn't say rules over or
19 vetoes or countermands -- administers the Public Health
20 Service.

21 So the Assistant Secretary for Health is just an
22 administrator. It's not a ruling official that can
23 countermand decisions of the Affordable Care Act,
24 specifically and exclusively vests in ACIP, HRSA, and the
25 Task Force.

1 And how can the Secretary's ratification argument
2 be squared with the text of 42 U.S.C., Section 299b-4, which
3 says, and I've quoted this before in our briefing, "All
4 members of the Task Force convened under this subsection and
5 any recommendations made by such members shall be
6 independent, and to the extent practicable, not subject to
7 political pressure."

8 This is clearly a regime that is designed to
9 insulate the decisions of the Preventive Services Task Force
10 from political interference and giving the Secretary the
11 power to override or veto the Task Force recommendations at
12 will is incompatible with the political independence secured
13 by Section 299b-4. The Task Force is not part of HHS. The
14 Secretary has no authority to overrule its decisions.

15 The second and more serious problem, though, with
16 the government's ratification argument is that it would
17 still violate the appointments clause for ACIP and HRSA and
18 the Task Force to impose preventive care mandates on their
19 own, even if those decisions can later be reversed or
20 countermanded by the Secretary.

21 And here's why. They're still given the power to
22 impose preventive care mandates, which will remain in effect
23 until the Secretary gets around to weighing in on the
24 question. That is still significant authority pursuant to
25 the laws of the United States.

1 On top of that, the Secretary cannot, even on the
2 government's view -- and the government should correct me if
3 I'm mischaracterizing their position -- but the Secretary
4 cannot override a decision not to impose a preventive care
5 mandate by ACIP, HRSA, or the Task Force.

6 Their assent is a necessary condition for a
7 preventive care mandate to be imposed even on the
8 government's ratification theory.

9 If they don't propose or recommend something, the
10 Secretary can't impose it on his own initiative. So they
11 still wield significant authority under the laws of the
12 United States because they can impose the preventive care
13 mandate before the Secretary weighs in.

14 And secondly, they still have this vetogate power.
15 If they don't approve a recommendation, the recommendation
16 cannot take effect, even if the Secretary or the President
17 or someone higher up on the food chain wants it.

18 So coming or going, they are exercising and
19 wielding significant authority pursuant to the laws of the
20 United States and they must be appointed as officers. Even
21 if we accept this ratification idea, which I certainly don't
22 accept, but even if this Court were to indulge the
23 possibility of ratification by the Secretary, it doesn't
24 cure the appointments clause problem.

25 The government does not have a good answer to this

1 point in its reply brief. You still need to be an officer
2 of the United States, even when you are temporarily imposing
3 preventive care mandates that might later be reversed by the
4 Secretary.

5 And you still have to be an officer of the United
6 States when your approval is a necessary condition for a
7 preventive care mandate to go into effect.

8 Now, this is unquestionably significant authority
9 pursuant to the laws of the United States. And Lucia proves
10 as much, because it holds that administrative law judges are
11 officers of the United States, even though the decisions of
12 an administrative law judge can be reviewed and reversed by
13 an agency on appeal. So that's the issue with respect to
14 ratification.

15 The second big point the government makes is this
16 question about, what's the remedy? So if one assumes there
17 is an appointments clause problem, what should the remedy
18 be?

19 And the government claims that we are seeking an
20 improper remedy. They're claiming the Court should enjoin
21 the defendants from enforcing the preventive care mandates
22 because they were issued by individuals who were not
23 appointed consistent with Article II.

24 The government says that's not the proper remedy.
25 What the Court should instead do is issue some type of

1 ruling, and I'm not sure how this would take effect, but the
2 Court should somehow decree that the Secretary of Health and
3 Human Services can countermand the decisions of ACIP, HRSA,
4 and the Task Force, thereby curing the so-called
5 appointments problem.

6 Well, let's start with the first and what I think
7 is the most serious problem in this proposal, and this is
8 the point I've already made, a regime in which the Secretary
9 of Health and Human Services ratifies or countermands the
10 recommendations of ACIP, HRSA, and the Task Force, still
11 violates the appointments clause for the reasons I've said
12 previously.

13 Number one, ACIP, HRSA, and the Task Force are
14 still wielding significant authority pursuant to the laws of
15 the United States because their recommendations take effect
16 without the Secretary's approval, even if the Secretary can
17 later decide to ratify or reverse the decision.

18 Number two, the approval of the ACIP, HRSA, and
19 the Task Force is necessary for a preventive care mandate to
20 take effect, even under this regime imposed by the
21 government.

22 So they're still wielding significant authority
23 pursuant to the laws of the United States and that clearly
24 follows from the Supreme Court's holding in Lucia, because
25 the administrative law judges were still held to be officers

1 who had to be appointed consistent with Article II, even
2 though their decisions were reviewed and possibly
3 reversed -- subject to reversal by some superior who was
4 higher up in the food chain.

5 The government relies heavily on Arthrex from the
6 Supreme Court's decision two terms ago. The situation in
7 Arthrex was very different, because the Court's remedy in
8 that case made every decision by the administrative patent
9 judges reviewable by the director of the Patent and
10 Trademark Office, and that's regardless of which direction
11 the decision took. All right?

12 In this case, there is no way for a principal
13 officer to override a decision not to enact or recommend new
14 coverage mandates.

15 What the government is describing in this regime
16 in which ACIP, HRSA, and the Task Force make
17 recommendations, those recommendations can be reversed later
18 by the Secretary, but the nonrecommendations can't.

19 They're not proposing a regime where the Secretary
20 gets to come in and say, we're going to impose this
21 preventive care mandate against the wishes of HRSA or
22 against the wishes of ACIP or against the wishes of the U.S.
23 Preventive Services Task Force.

24 There's another big difference in this case in
25 Arthrex. There was no dispute in Arthrex that the

1 administrative patent judges were improperly appointed as
2 inferior officers in a manner consistent with Article II.

3 That's not the situation here, because there is no
4 statute that vests the appointment of the ACIP members or
5 the HRSA members or the U.S. Preventive Services Task Force
6 Services members in the President alone or in the courts of
7 law or in the heads of department.

8 For an inferior officer to be appointed consistent
9 with the Constitution, Congress must, by law, vest that
10 appointment in the President alone or the courts or the
11 heads of department. There has to be a statute. And the
12 government hasn't pointed to one yet that can qualify under
13 Article II.

14 Here's the second problem with the government's
15 proposed remedy. Courts do not have the power to invent new
16 statutory powers as part of a judicial remedy. They can't
17 rewrite a statute. They have to award declaratory or
18 injunctive relief between the named litigants.

19 There are currently preventive care mandates in
20 effect. My clients are claiming that these mandates are
21 unlawful because they were imposed by individuals who are
22 not appointed as officers of the United States.

23 If the Court agrees with us, the only permissible
24 remedy is to restrain the defendants from enforcing them
25 until Congress changes the statute to fix the appointments

1 clause problem.

2 The Court can't make the decision for Congress
3 about how the appointments clause problem can be fixed. The
4 Court's job is to give relief to my clients that will
5 address their injuries, and then allow the political
6 branches to decide how to respond.

7 The Court does not have the prerogative to give
8 new powers on agency officials that Congress has not
9 confirmed.

10 The third problem is a remedy that's issued by
11 this Court has to redress the injuries that the plaintiffs
12 are alleging. Otherwise, it's an advisory opinion. The
13 Arthrex-like remedy that the government proposes does not do
14 that.

15 My clients are alleging injury in fact from the
16 imposition and enforcement of the preventive care mandates.
17 The government's proposed remedy will leave that injury in
18 place.

19 And if the Court were to issue that remedy after
20 finding the violation of the appointments clause, it would
21 be issuing an advisory opinion because it would not be
22 ruling on the Constitution in a way that redresses an injury
23 that the plaintiffs have asserted.

24 My clients would still remain subject to the
25 preventive care mandates. The injuries they alleged would

1 still be in effect. And the Court would not have addressed
2 the injury in any way, shape, or form. So Article III, in
3 our view, prevents that remedy that the government is
4 proposing.

5 The third big issue the government raises in its
6 brief, it claims there was never an appointments clause
7 problem in the first place and suggests that all of the
8 relevant players were appointed in a manner consistent with
9 Article II: the members of ACIP, the administrator of HRSA,
10 and the members of the Task Force.

11 So I'll go through each of those three entities
12 one by one, with the Court's permission. Let's start with
13 ACIP. The government relies on the fact that the CDC
14 director is constitutionally appointed, which he is, and it
15 then relies on the fact that ACIP advises the CDC director.

16 This argument would have worked before the
17 enactment of the Affordable Care Act when ACIP was truly an
18 advisory committee.

19 It doesn't work when the Affordable Care Act gives
20 ACIP power to dictate the immunizations that private
21 insurers must cover. The members of ACIP have become
22 principal officers once President Obama signed the
23 Affordable Care Act into law, because Section 300gg-13(a)(2)
24 requires that the recommendations -- so-called
25 recommendations -- take effect without subjecting their work

1 to the direction or supervision of a principal officer.

2 But even if we accept the government's claim that
3 the CDC director can ratify and override and countermand the
4 ACIP recommendations, the ACIP members still qualify as
5 principal officers because an ACIP recommendation, as we
6 said before, is necessary for any immunization coverage
7 requirement to take effect.

8 There's no statute anywhere that we can find that
9 allows a principal officer to override an ACIP refusal to
10 recommend a vaccine or an immunization.

11 And then finally, even if the members of ACIP
12 somehow were named inferior officers rather than principal
13 officers, their appointments remain unconstitutional because
14 the government has not identified an act of Congress that
15 vests those appointments in the President alone or in the
16 courts of law or in the heads of department.

17 The government tries to rely on 42 U.S.C.,
18 Section 217a, but this statute does not work because it
19 authorizes the Secretary to make appointments to "such
20 advisory councils or committees for the purpose of advising
21 him in connection with any of his functions."

22 ACIP can't be considered an advisory committee
23 anymore because it's been given powers by the Affordable
24 Care Act to give its so-called recommendations binding
25 force. That's not advice. That is an edict. That is an

1 exercise of actual government power.

2 So 217a will not salvage the appointments clause
3 problem. It will not qualify as an act of Congress that
4 vests the appointment of these ACIP members in the Secretary
5 alone because, again, it only allows the Secretary to
6 appoint advisory committees, which ACIP was prior to 2010,
7 but no longer is.

8 On HRSA, the administrator of HRSA is a principal
9 officer for the exact same reasons, right? It's empowered
10 by the Affordable Care Act to unilaterally determine the
11 preventive care that private insurers must cover.

12 And these preventive care recommendations are not,
13 under the text of the statute, subject to the direction or
14 supervision of the Secretary or any other principal officer.

15 Now, again, the government tries to respond by
16 arguing that the Secretary really does have power to
17 countermand HRSA's decision making. So if HRSA recommends
18 contraception coverage, the government claims that the
19 Secretary can override that.

20 Even though it's not explicit in 300gg-13(a)(4),
21 the government claims that that is implicit based on
22 background principles of administrative law and other
23 statutory provisions.

24 Again, even if one were to assume that, and again,
25 we don't assume that, the plaintiffs, but even if the Court

1 were to assume that for the sake of argument, the director
2 of HRSA is still a principal officer because, number one,
3 the recommendations of HRSA still take effect before the
4 Secretary gets around to deciding whether to ratify it.

5 And number two, the recommendation of HRSA is
6 still a necessary condition for a preventive care mandate to
7 take effect. For there to be a contraceptive mandate, the
8 director of HRSA must go along with it.

9 If there's no recommendation from HRSA, there's no
10 authority vested in any other person in the government to
11 impose the contraceptive mandate against the wishes of the
12 HRSA administrator.

13 That is the power held of a principal officer.
14 It's not subject to review or override. Even if one accepts
15 the government view that the recommendations can be
16 overridden, the nonrecommendations can't. So same problems
17 with ACIP.

18 Now, moving on to the Task Force. Here's where
19 the government, in our view, really runs into problems with
20 the U.S. Preventive Services Task Force. Here's the Task
21 Force officer of the United States under Lucia, number one,
22 it must "occupy a continuing position established by law;
23 two, it must exercise significant authority pursuant to the
24 laws of the United States."

25 The U.S. Preventive Services Task Force, the

1 members clearly occupy a continuing position established by
2 law. Just look at the statute, 42 U.S.C., Section 299b-4
3 (a)(1). It says, "The director shall convene an independent
4 preventive services task force to be composed of individuals
5 with the appropriate expertise."

6 All right. So there's a statute that requires
7 that a task force be established, and that its members be
8 populated by experts, and that it be convened by the
9 director of ACIP.

10 So there is a statute that establishes this
11 position. It's established by law, continuing position
12 established by law.

13 And then the statute goes on to describe the
14 duties of the task force, the agency's role in supporting
15 the work of the task force, independence from political
16 pressure.

17 And then, of course, the provision in the
18 Affordable Care Act that gives the task force the power to
19 determine the preventive care that all private insurers must
20 cover.

21 So the only remaining question is whether that's
22 significant authority pursuant to the laws of the United
23 States. And if that's not significant authority pursuant to
24 the laws of the United States, it's hard to imagine what
25 could be.

1 This is an entity that can, by unilateral decree,
2 tell every private insurer, both the self-insured plans and
3 the plans offered by insurance companies, what they must
4 cover at no cost to the beneficiary, without co-pay or
5 deductible.

6 And again, even if we assume the possibility of a
7 veto power in the Secretary, there's still significant
8 authority wielded by the Task Force.

9 It's almost like the relationship between the
10 Congress and President, which is how I understand the
11 government's ratification argument.

12 The Task Force makes recommendations. The
13 Secretary can override the recommendation in an act akin to
14 a presidential veto, but the Task Force still has to make
15 the recommendation before it can take effect.

16 There's still significant authority vested in that
17 Task Force, even if there is this later ratification by the
18 Secretary. And again, the nonrecommendations can never be
19 reviewed because there's no statute that empowers the
20 Secretary or the President or anybody else to impose a
21 preventive care mandate absent a recommendation from the
22 U.S. Preventive Services Task Force.

23 So again, that's our presentation on the
24 appointments clause. Your Honor, if I could just briefly
25 address nondelegation and RFRA?

1 With nondelegation, we have seen from the Supreme
2 Court some hints, perhaps one could say trying to read the
3 tea leaves, with some interest in possibly revising the
4 nondelegation doctrine.

5 The government is suggesting that it really should
6 be the Supreme Court's prerogative if they want to breathe
7 new life into the doctrine to do so, given the language that
8 we saw in *Little Sisters of the Poor*.

9 The government may very well be right, there has
10 been, at least from 1935, no decisions from the Supreme
11 Court that have declared a federal statute unconstitutional
12 for failing to provide an intelligible principle. I don't
13 see any intelligible principle in the statute whatsoever.

14 So unless the Court is willing to acknowledge that
15 there simply is no nondelegation doctrine or that everything
16 qualifies as an intelligible principle, it's hard for us to
17 understand what the intelligible doctrine would be, because
18 there's nothing in the statute that purports to direct the
19 Task Force or HRSA or ACIP in their discretion. It just
20 seems to be trusting these entities to exercise their
21 discretion the way that will be consistent with the public
22 interest.

23 Courts have been very aggressive in reading in
24 intelligible principles in the statutes. That may be the
25 approach the Court might want to use here.

1 But I think the acid test would be, what would be
2 an unlawful use of this delegating power?

3 The statute defines the boundaries of the power by
4 saying, it has to be preventive care, or in some cases,
5 (a) (4) preventive care for women. And in (a) (2), it has
6 immunizations or vaccines. That defines the boundaries of
7 the delegated power, but there's nothing that actually says
8 how that delegated power should be exercised within those
9 boundaries. That's what an intelligible principle is. It's
10 something that tells the agency, how do you use your
11 discretion.

12 So again, it may be proper to leave this to the
13 Supreme Court to let them decide whether they want to start
14 reviving the nondelegation doctrine in any way, shape, or
15 form.

16 But the judicial test in the nondelegation is
17 leading to statutory enactments like this, where Congress
18 doesn't even try to tell the agency what it should do, not
19 even a statement regulating the public interest, or do so
20 according to sound health policy, not even in bromides and
21 platitudes.

22 So again, courts may try to read that into the
23 statute; some courts have done so. But maybe it's up to the
24 justices to ultimately take the first step here.

25 On RFRA, I just want to return to the point I made

1 earlier about standing. The court has to accept
2 complicity-based objections, as long as they're sincere.

3 The government in their brief is attacking some of
4 the factual assertions that our clients are making with
5 respect to their alleged complicity and conduct that
6 violates their religious belief, but that's not the role of
7 the Court.

8 If the client says that this makes me complicit --
9 I'm sorry. If the plaintiff says, this makes me complicit
10 in conduct that violates my religious belief, the question
11 for the Court to resolve is only whether that complicity
12 objection is sincere.

13 It's possible for a complicity-based objection to
14 be so delusional that it might lead the Court to question
15 the sincerity of the objection, but the government is not
16 making that claim. I don't think that's a plausible way to
17 characterize what our clients are asserting.

18 Dr. Hotze believes that providing this coverage
19 makes him complicit in conduct that violates his religious
20 belief. The Court has to accept that, unless he thinks
21 Dr. Hotze is lying.

22 He's presented a sworn affidavit that explains his
23 complicity-based objections in detail. That affidavit is
24 un rebutted.

25 Again, the government is not questioning the

1 sincerity. They're just questioning factually whether his
2 beliefs are correct.

3 Just like in Hobby Lobby, that's not the role of
4 the Court. It's not for the Court to say, Hobby Lobby, you
5 think this is an abortifacient but you're wrong to think
6 that.

7 The question for the Court is, is Hobby Lobby
8 sincere in thinking that this actually is an abortifacient,
9 and is Hobby Lobby sincere in believing that this complicity
10 in abortifacient contraception is contrary to its religious
11 beliefs. Nothing more than that. And then a substantial
12 burden is established.

13 And then from there, we believe the RFRA argument
14 just flows naturally from Hobby Lobby, because there's
15 obviously a less restrictive means of providing this
16 universal coverage that the government is trying to obtain
17 by commandeering Braidwood Management's health plan to
18 provide the coverage. For example, the government could
19 provide it just like they did provide it in Hobby Lobby.

20 So if you have questions?

21 THE COURT: Just in terms of the appointments
22 clause arguments and your colleague's response to that,
23 their argument seems to me is that there is a well-accepted
24 general understanding of the structure of government and the
25 structure of these agencies.

1 And their argument, and they cited a Supreme Court
2 case that says that Congress will specifically change that
3 structure -- if they change that structure, it will
4 specifically do so.

5 And that these provisions (a)(1) through (4),
6 whichever ones apply, don't specifically change that
7 structure.

8 And so, that background understanding of the
9 structure of government and the structure of agencies should
10 be read into the statutes.

11 MR. MITCHELL: Yeah. Even if they're right to say
12 that, and I don't think they are, but even if they were
13 right, you still have to deal with the problem of Lucia.

14 Because, in Lucia, the administrative law judge
15 was subject to review by his superiors. He was still
16 considered an officer of the United States. He still had to
17 be someone who was deemed -- he still had to be appointed
18 consistent with the requirements of Article II. Now, that
19 was an inferior officer, not a principal officer.

20 The second problem that they have to confront is
21 that they are acting as principal officers because, under
22 the statute, they still have to recommend coverage of
23 preventive care before a mandate of preventive care can take
24 effect.

25 So even if one were to accept the idea that the

1 Secretary can veto their recommendations, I don't see how
2 the government can get around the problem that their
3 recommendation is still a necessary condition for the
4 preventive care coverage mandate to take effect.

5 I also don't know how they can get around the
6 problem that the recommendation itself allows the mandate to
7 take effect even before the Secretary has weighed in on it.

8 So we can indulge the assumption perhaps, so the
9 secretary can overrule a recommendation or ratify it 10
10 years later, as Secretary Becerra has done, but that doesn't
11 in any way, in our view, cure the appointments clause
12 problem, because they are still wielding significant
13 authority pursuant to the laws of the United States.

14 And they are wielding that authority without
15 supervision, because the recommendation takes effect
16 immediately, without approval from one of their superiors.

17 And there's just no way, under the statute, for a
18 mandate to take effect if they don't sign off on it. So
19 they essentially are acting as a veto here. And they have
20 to be appointed officers for that to happen.

21 THE COURT: In their footnote, they cite an
22 example of the CDC director imposing a recommendation
23 related to COVID that the FDA recommended should be imposed
24 in the way she wanted it imposed.

25 What's the difference?

1 Is it statutory language between the two?

2 MR. MITCHELL: They did mention it, I think -- is
3 this the example of the COVID booster shot that ACIP
4 recommended and the CDC nixed? Is that what it was?

5 THE COURT: Right. It's either that or it's the
6 reverse.

7 MR. MITCHELL: Okay. Right. So could I respond
8 to that situation first, if I could?

9 THE COURT: Yes.

10 MR. MITCHELL: So ACIP recommends a booster shot
11 or something to that effect, the CDC director vetoes it.
12 The question then would be, is that consistent with the
13 statute, because the statute seems to say what ACIP says
14 goes, right?

15 So it's not clear to me the CDC director has that
16 authority. But even if one were to assume the CDC director
17 had it, ACIP is still exercising significant authority
18 pursuant to the laws of the United States.

19 Because even though its recommendation didn't take
20 effect in that particular situation it has in other
21 situations. And its recommendation is still needed under
22 the statute for any preventive care mandate to take effect
23 under the Affordable Care Act.

24 Now, there may be other sources of authority for
25 these mandates to be imposed, but under the Affordable Care

1 Act, as written, ACIP has to make the recommendation before
2 private insurance is required to cover it as a vaccine with
3 no co-pays.

4 THE COURT: Okay. Okay. Very good. Anything
5 else?

6 MR. MITCHELL: Nothing further, your Honor. Thank
7 you.

8 MR. LYNCH: So we will start with the appointments
9 clause, your Honor. The premises of plaintiffs' argument is
10 that the preventive services provision, that's unreviewable
11 authority outside the regular structure of HHS in these
12 entities, but there's no language in the statute that says
13 that.

14 The other statutes, 42 U.S.C., 202, which my
15 colleague just mentioned, the reorganization plan which we
16 cite in our brief which was adopted by Congress, all of
17 these things and the principles of administrative law set
18 out how HHS works.

19 If the Secretary has authority over the whole
20 department, flowing down, they can direct and supervise the
21 administrator of the Public Health Service. The CDC and
22 HRSA specifically are in the Public Health Service.

23 And as he acknowledges, the CDC director and the
24 HRSA administrator are officers of the United States that
25 are properly appointed.

1 The HRSA administrator sets out the guidelines or
2 accepts the guidelines. The CDC director accepts the ACIP
3 recommendations for them to take effect as the statute
4 requires coverage if the recommendations are in effect.

5 So inferior officers of the United States, who are
6 properly appointed with respect to clearly the HRSA
7 administrator and the CDC director, are the people who are
8 calling the shots for provisions in subsections, what is it,
9 (a) (2) through (a) (4).

10 I don't think there's any reasonable question
11 about that. The Secretary has the authority to directly
12 supervise them in turn. So the Secretary's ratification, if
13 it were even needed, ends the appointments clause claim on
14 the merits. That's what the Guedes and other decisions say
15 from the D.C. Circuit that we talk about.

16 The Fifth Circuit in Willy vs. Administrative
17 Review Board made clear the Secretary has ample authority to
18 appoint inferior officers and delegate final decision-making
19 authority to them under 5 U.S.C., Section 301 in a
20 reorganization that is identical to the one that governs
21 Public Health Service here.

22 So the plaintiffs talk about sort of what happens
23 after, if the Secretary chooses not to ratify. That's
24 really not the point here. The recommendations and
25 guidelines would be properly in effect if the Secretary

1 didn't choose to ratify, but the Secretary has the authority
2 to do so and that ends the claim.

3 He doesn't point to any authority for the claim
4 that the administrative process can't start with
5 nonofficers. I don't see why it couldn't. They make
6 recommendations. They're accepted. They are discussed
7 internally. They're rejected. That's how the
8 administrative process routinely goes.

9 As far as the present Preventive Services Task
10 Force goes, it's a little more complicated. As my colleague
11 noted, the Task Force itself is outside of HHS. They're a
12 nongovernment body.

13 I think the easiest -- they're volunteers.
14 They're volunteer doctors. I think the easiest path for the
15 Court to resolve this is that Section 42, U.S. Code
16 299b-4(a)(6) provides that recommendations made by the
17 members of the PSTF shall be independent, and to the extent
18 practicable, not subject to political pressure, which the
19 Secretary can -- it admits that there's some aspect of
20 political participation that can be involved. It's just, to
21 the extent practicable, they're not to be subject to
22 political pressure.

23 So here, the Secretary, by ratifying their
24 guidelines and recommendation, I don't think it runs afoul
25 of that requirement. It's not imposing new obligations or

1 pressure on them. Then this is not a case where the
2 question is, well, did the Secretary impose an improper
3 degree of pressure? That would be another case.

4 But even, regardless of whether the -- the
5 Secretary's ratification is sort of the easiest path, and if
6 your Honor believes you need to sever the independence prong
7 of that statute in order to allow the PSTF to be directed
8 and supervised more properly by the agency, that's another
9 way to get there.

10 But regardless, PSTF members aren't federal
11 officers under the binding law of this circuit, the Supreme
12 Court precedent, or the OLC opinion that plaintiffs have
13 cited in their brief.

14 The Fifth Circuit in Riley sitting en banc
15 requires a formalized relationship of employment with the
16 United States government for an individual to be an officer
17 of the United States.

18 PSTF members undisputedly do not satisfy this
19 criterion. They're not employees. They're volunteer
20 doctors. The OLC memo says that federal office involves
21 necessarily the power to legislate, to execute the law, or
22 to hear and determine judicially submitted questions.

23 I think, as we noted in pages 43 and 44 of our
24 opening brief all the cases cited where any court -- by
25 either party -- where any court weighs in on what is an

1 officer basically has a reasoning that is consistent with
2 the Fifth Circuit's employment or the OLC memos legislate,
3 execute judicial power.

4 The PSTF doesn't do that. All they do is make
5 recommendations about what is a medically acceptable
6 standard of care. They are specifically limited by statute
7 to review any scientific evidence related to the
8 effectiveness, appropriateness, and cost-effectiveness of
9 clinical preventive services for the purpose of developing
10 recommendations for the healthcare community.

11 And then Congress has decided -- Congress, who has
12 the authority to regulate the insurance markets, has said
13 they have adopted these regulations -- or these
14 recommendations as binding on insurance companies.

15 PSTF is not charged in any way with making
16 decisions about insurance or thinking about insurance.
17 Their job is just to make these medical recommendations.
18 And that's, you know, set forth in the statute that governs
19 their actions.

20 Let's see. As far as sort of the timing of the
21 Secretary's ratification. You know, at this point, the
22 Secretary has ratified every single currently-in-effect
23 recommendation under this provision.

24 So the plaintiffs don't have standing to raise
25 what would happen in a future case if the Secretary decides

1 not to ratify. That's just not before the Court right now.

2 On the vesting clause, which my colleague didn't
3 mention, it's largely the same as governing the PSTF, but
4 there's one specific claim that he makes in his briefing,
5 and the cases that he relies on are about the insulation
6 from removal of different entities.

7 And there's no protection from removal that
8 applies to PSTF members. He doesn't point to one. So that
9 premise is wrong, and those cases don't apply to the PSTF.

10 On nondelegation, the plaintiffs' nondelegation
11 claim is precluded squarely by the Fifth Circuit's decision
12 in Big Time Vapes. There, they write, "Delegations are
13 constitutional, so long as Congress lays down, by
14 legislative act, an intelligible principle to which the
15 person or body authorized to exercise the authority is
16 directed to conform."

17 And specifically, when talking about what the
18 intelligible principle is, they say, excuse me, "It is
19 constitutionally sufficient if Congress clearly delineates
20 the general policy, the public agency which is to apply it,
21 and the boundaries of delegated authority."

22 And this language is particularly important --
23 that's at pincite 441 in the Big Time Vapes case -- because
24 my colleague here has suggested that setting boundaries is
25 different than setting forth an intelligible principle.

1 That's not what the Fifth Circuit says. The boundaries are
2 the intelligible principle. There's no distinction.

3 We go through it in our brief, all the various
4 ways in which the statute does set forth boundaries. They
5 talk about who is making these decisions.

6 The PSTF in particular as I mentioned is not just
7 subject to the boundaries in this provision, the preventive
8 services provision, but also is subject to the limitations
9 in 482 U.S.C. 299b-4(a)(1) which says, as I mentioned
10 earlier, they are limited to a review of scientific evidence
11 related to the effectiveness, appropriateness, and
12 cost-effectiveness of clinical preventive services.

13 The ACIP can only recommend immunizations that
14 have in effect a current recommendation with respect to the
15 individual involved. And, of course, the CDC director, as I
16 said earlier, has to sign off. So -- but ultimately, Big
17 Time Vapes precludes their claim here.

18 As far as the RFRA claim goes, I'm happy to rest
19 on the briefs, given my colleague's representation that
20 they're limiting their claim to the prEP mandate.

21 THE COURT: Is either the director of the CDC or
22 the Secretary of HHS, would they be able to reject ACIP
23 recommendations before they take effect?

24 Your colleague, in his briefing papers and here
25 today, points out that the time difference means that they

1 are officers.

2 MR. LYNCH: Right. So, by law, the ACIP
3 recommendations do not take effect until the CDC director
4 says they do. The CDC director's concurrence is what gives
5 them effect. Otherwise, they are advisory recommendations
6 from a federal advisory council.

7 THE COURT: Okay. And so, is there a difference
8 then in recommendations and the mandate?

9 MR. LYNCH: So the recommendations that are
10 accepted by the HRSA administrator and the CDC director,
11 that's when the coverage requirements take effect. That's
12 when they become coverage requirements. Otherwise, they're
13 just recommendations or guidelines.

14 THE COURT: So there is a difference?

15 MR. LYNCH: Yes.

16 THE COURT: That is, ACIP, HRSA, they will make
17 recommendations. They're not in effect. Insurance
18 companies do not have to comply with them?

19 MR. LYNCH: Correct.

20 They take effect when the HRSA administrator
21 agrees to support HRSA and the CDC director agrees to accept
22 the basic recommendations.

23 THE COURT: And so, on the HRSA then, when the
24 administrator agrees, that's when the mandate will flow to
25 the private sector?

1 MR. LYNCH: Correct.

2 THE COURT: And even absent the Secretary
3 accepting them, ratifying them, taking any action, vis-a-vis
4 the recommendation?

5 MR. LYNCH: Right. They're inferior officers who
6 can make that decision. You know, they are subject to the
7 direction and supervision of the Secretary. The Secretary
8 could stop them presumably, but --

9 THE COURT: So could the Secretary, if the HRSA
10 administrator says, I agree and support and recommend, could
11 the Secretary intervene and say, do not allow your authority
12 to take effect and mandate to the private sector?

13 MR. LYNCH: So for certain the Secretary could
14 remove those officers before they take that step. I am not
15 100 percent certain whether the Secretary could, if they
16 say, accept the recommendation, somehow stop it in
17 mid-course.

18 I would want to consult with HHS on that, and I
19 could respond in a notice in a few days, if your Honor
20 wishes.

21 THE COURT: Okay. Fine.

22 Because I do think that's an important issue that
23 the plaintiffs are putting forth. Of course, all of them
24 are. But they're saying, notwithstanding your arguments,
25 there could be a time period in which the HRSA administrator

1 or the ACIP people could make recommendations, support
2 policies that would go into effect before the Secretary
3 could get around to acting on it, and that affects the
4 status of that, whether they're officers -- principal
5 officers or not.

6 MR. LYNCH: But to be clear, your Honor, of
7 course, here, since the Secretary has now accepted all of
8 them that's not an issue at the moment.

9 THE COURT: Right. But doesn't their argument go
10 to the fact of the evidence of or the details relating to
11 what their status is, vis-a-vis the appointments clause of
12 the Constitution, right?

13 In other words, he's coming in and saying he
14 ratified it. And so, therefore, there's no problem. But
15 they're also saying, this is evidence of the fact that they
16 must be appointed pursuant to the appointments clause.

17 MR. LYNCH: I understand the point, your Honor,
18 and I will get back to you on that issue.

19 THE COURT: And they also cite in their briefing
20 the language from the Little Sisters of the Poor where the
21 majority opinion talks about this sweeping, this very broad
22 authority granted to the HRSA.

23 And so, doesn't that lend additional support to
24 their argument that they need to be appointed consistent
25 with the appointments clause?

1 MR. LYNCH: So I don't believe that the Little
2 Sisters decision helps their argument at all. Little
3 Sisters affirms regulations in which the department directs
4 HRSA to exempt certain parties from any guideline.

5 The department can only do that if they have
6 authority to stop those guidelines. You know, if my
7 friend's argument is correct, then the regulations that
8 Little Sisters upheld would be invalid because the
9 department would have no authority to tell HRSA what to do
10 about these things. That's not what happened in Little
11 Sisters.

12 THE COURT: As it relates to the Task Force, you
13 mentioned that they are volunteers, and then you cite to the
14 Fifth Circuit's analysis in Riley vs. St. Luke's that
15 there's got to be some kind of continuing and formalized
16 relationship of employment. And then, of course, you talk
17 about the OLC opinion.

18 But as it relates to the language in that case, it
19 talks about the relationship of employment, does that
20 necessarily mean paid? That they have to be paid?

21 MR. LYNCH: I think it definitely does it's
22 following up on Supreme Court decisions that go back a
23 century that make clear that it's about emolument and
24 payment to get that appointment relationship. We cite those
25 in our brief.

1 THE COURT: And so, if you have an intern, an
2 unpaid intern working for you for a year or for a summer or
3 something, would they then not be considered employed or in
4 an employment relationship?

5 MR. LYNCH: From the perspective of the
6 appointments clause, I think so, yes.

7 THE COURT: Okay. Okay. Anything else?

8 MR. LYNCH: That's it for me. Thank you, your
9 Honor.

10 MR. MITCHELL: Thank you, your Honor.

11 Just a few points briefly in response to what
12 Mr. Lynch has said.

13 He does rely on the statute governing the Public
14 Health Service, but it's important to bear in mind, the U.S.
15 Preventive Services Task Force is not part of the Public
16 Health Service. Only ACIP and HRSA are included in that.
17 So that argument can only work for the two of the three
18 relevant entities.

19 Second, I agree with Mr. Lynch, there's nothing
20 wrong with having a nonofficer make recommendations to an
21 inferior or principal officer, but these are not
22 recommendations.

23 I know the statute calls them recommendations, but
24 that's not what they are. They take effect as law, as
25 binding legal obligations once they are "Recommended" by the

1 relevant entity.

2 So I understand that is the term that appears in
3 the Affordable Care Act, but it's somewhat Orwellian to say
4 that these are recommendations in the way that a law clerk
5 might recommend something to the judge for whom he works.
6 This is something that takes effect without approval from
7 any superior in the government.

8 Mr. Lynch relies on Riley against St. Luke's
9 Episcopal Hospital, which I did not address in my opening
10 remarks. It's a binding precedent of the Fifth Circuit so
11 it has to be taken very seriously.

12 The opinion from Judge Smith does say that an
13 officer must, in his words, "Have a continuing and
14 formalized relationship of employment with the United States
15 government."

16 But this does not require paid employment.
17 There's nothing in the opinion that says that. And the
18 opinion from the Office of Legal Counsel in 2007
19 emphatically rejects the idea that paid employment is
20 necessary to be an officer of the United States.

21 So it would not be prudent, in our view, to
22 interpret the Riley opinion in a manner that contradicts the
23 views of the Office of Legal Counsel.

24 It's certainly not necessary to interpret the word
25 "employment" to require paid employment. A person can

1 employ another individual without paying them. You can
2 employ a thing without paying it.

3 If one looks at the statute in the U.S. Preventive
4 Services Task Force, this is a statute that creates the
5 entity, the U.S. Preventive Services Task Force. This was a
6 statute passed by Congress in 1984 that defines its role,
7 creates it, sets forth how it will be convened, describes
8 its membership.

9 So there is employment with the federal
10 government, even if its members aren't being paid by the
11 federal government for those services.

12 THE COURT: Is that why you think it's different
13 than the stand ANSI or the state statutes that federal laws
14 and regulations incorporate?

15 The difference here is --

16 MR. MITCHELL: That's right.

17 THE COURT: -- the federal government creates
18 this?

19 MR. MITCHELL: That's exactly right. This is a
20 creation of a federal statute, as opposed to these other
21 entities that exist independent of the federal government.
22 They weren't created by it. The states, likewise, they were
23 just state government entities.

24 So there is an employment relationship here,
25 because this Task Force exists because of the federal

1 statute that brought it into being.

2 And then, finally, Mr. Lynch relies on the
3 statutory language that says, "To the extent practicable,
4 the task force shall be insulated from political pressure,"
5 and the citation is 42 U.S.C. 299b-4(a)(6). To the extent
6 practicable.

7 Now, the word "practicable" means that you should
8 do whatever is necessary to ensure political independence
9 without resorting to ridiculous or cost-prohibitive
10 measures.

11 It does not mean that the statutory requirement
12 can be ignored simply because there might be an appointments
13 clause problem created by its interaction with other
14 provisions of the U.S. Code. So I don't think that's a
15 tenable construction of that phrase, "to the extent
16 practicable."

17 What that requirement is, is to take all means
18 that are necessary and reasonable to insulate and protect
19 the members of the Task Force from any type of political
20 influences with respect to their so-called recommendations.

21 And they were recommendations before 2010. But to
22 call them recommendations after 2010, again, that's a
23 misnomer once the Affordable Care Act was signed into law.

24 So that's all I have, your Honor. Unless you have
25 further questions?

1 THE COURT: Just in terms of the removal of the
2 Task Force officers --

3 MR. MITCHELL: Yes.

4 THE COURT: -- is it your belief they can or
5 cannot be removed by the Secretary or President?

6 MR. MITCHELL: Under the statute, they can't be,
7 because they have to be protected from political pressure.

8 Now, under the vesting clause, they should be
9 removable at-will if they're exercising authority under the
10 laws of the United States. Because, in our view, the
11 Constitution does not provide for independent entities to
12 make these types of decisions without presidential
13 oversight. So this is the line of case of Myers, Humphrey's
14 Executor.

15 The recent decision from the Supreme Court,
16 especially the Seila law from 2020, really seems to treat
17 Humphrey's Executor almost as a one-off, and Morrison
18 against Olson.

19 The rule seems to be, from the current membership
20 on the Supreme Court, that people who wield power either in
21 the executive or the administrative branches should be
22 subject to presidential removal, unless you're in the
23 Humphrey's Executor box or the Morrison box, and neither of
24 those applies here.

25 So we do believe, given what Article II -- given

1 the way it's currently being interpreted by the Supreme
2 Court, there is a serious vesting clause problem with this
3 statutory regime where they can't be removed.

4 THE COURT: Thank you.

5 MR. MITCHELL: Thank you, your Honor.

6 THE COURT: Would you address the removal power?

7 Who has the removal power over the members of the
8 Task Force?

9 MR. LYNCH: Both the Secretary and the HRQ
10 director. The statute says that the director of the agency
11 for, I believe it's Healthcare Research and Quality, HRQ,
12 convenes the Task Force and can remove its members. There's
13 no limitation on that.

14 THE COURT: Okay. And can the Secretary override
15 a nonrecommendation from either ACIP or HRSA or the Task
16 Force?

17 And I don't know if overrides is the right word,
18 but if they do not recommend or they do not support,
19 whichever provision applies, is the Secretary empowered then
20 to step in and say, "I, Secretary Becerra, mandate now that
21 private insurance must cover this, notwithstanding ACIP's
22 decision, HRSA's decision, the Task Force's decision."

23 MR. LYNCH: Let me confirm 100 percent with HHS on
24 this, but the example I can think of is actually the COVID
25 vaccine we were talking about, the CDC director saying, when

1 ACIP made the recommendation that the COVID vaccine only be
2 available to a subset of -- the booster shot only be
3 available to a subset of the population. The CDC director
4 authorized it to be available to a larger group. So that is
5 going beyond what they recommend, but I would want to
6 double-check.

7 THE COURT: Okay. All right. Yeah, why don't you
8 do that.

9 MR. LYNCH: Thank you, your Honor.

10 THE COURT: And just so I'm clear here,
11 Mr. Mitchell, the relief you are seeking is an injunction or
12 declaration and that that applies to the plaintiffs in this
13 lawsuit?

14 You are not seeking a nationwide injunction or
15 universal injunction, whatever it's called?

16 MR. MITCHELL: We are requesting that, your Honor.

17 THE COURT: Okay.

18 MR. MITCHELL: Perhaps this has not been briefed,
19 and I didn't want to get too far ahead of myself by
20 addressing the scope before the Court had ruled on our
21 motion for summary judgment. Perhaps it might be
22 appropriate to brief --

23 THE COURT: I see.

24 MR. MITCHELL: -- if the Court rules on the merits
25 of our claims, what the scope of the declaratory injunctive

1 relief should be.

2 We did not bring this to a class action. So there
3 has not been a class certified. There would be questions
4 with respect to the individual plaintiffs.

5 Sometimes, under Fifth Circuit precedent, it is
6 permissible to extend relief beyond the named plaintiffs,
7 even in the absence of a certified class if that is
8 necessary to give the plaintiffs relief needed to address
9 their injuries.

10 We believe, with respect to our individual
11 plaintiffs, they would need universal relief in order to
12 enable them to obtain on the market the type of health
13 insurance they want. So that would be our request. But
14 again, that hasn't been briefed yet.

15 THE COURT: All right.

16 MR. MITCHELL: So it might be advisable to request
17 briefing.

18 THE COURT: Okay. Then I will work through the
19 merits before --

20 MR. MITCHELL: Yes.

21 THE COURT: -- and we will see if we need to
22 address that.

23 MR. MITCHELL: There was a lot to address in the
24 summary judgment motion, and I didn't want to overburden the
25 Court by getting into the specifics.

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THE COURT: Anything else?

MR. MITCHELL: Nothing further, your Honor.

MR. LYNCH: No. Thank you, your Honor.

THE COURT: Okay. Thank you all for being here.

We are in recess.

You're free to go. I had another case before you
all.

(The proceedings concluded at 10:41 a.m.)

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REPORTER'S CERTIFICATE

I, ZOIE WILLIAMS, RMR, RDR, FCRR, certify that the foregoing is a true and correct transcript from the record of proceedings in the foregoing entitled matter to the best of my ability to hear.

Further, due to the COVID-19 pandemic, some participants are wearing masks, and/or appeared via videoconferencing, so proceedings were transcribed to the best of my ability.

I further certify that the transcript fees format comply with those prescribed by the Court and the Judicial Conference of the United States.

Signed this 22th day of September, 2022.

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